IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

O R D E R

S.B.CRIMINAL MISC. PETITION NO. 1115/04
(Vidhya Ram Nagar & Anr. Vs. State of Rajasthan & Anr.)

Date of Order : 19/09/2006

PRESENT

HON'BLE MR. JUSTICE H.R.PANWAR

Mr. Mahesh Bora for the petitioners.
Mr. Ashok Upadhyay, public prosecutor
Mr. H.M.Saraswat for the non-petitioner No.2.

BY THE COURT:-

This criminal misc. petition under Section 482 of the Code of Criminal Procedure, 1973 (for short 'the Code' hereinafter) is directed against the order dated 8.10.2004 passed by Additional Sessions Judge No.2, Jodhpur (for short 'the revisional court' hereinafter), whereby the revision petitions filed by the petitioners and three others were partly allowed and the order taking cognizance dated 13.11.2001 passed by Judicial Magistrate, Jodhpur (for short 'the trial court hereinafter) against co-accused Kamlesh, Tarupesh and Smt. Shakti was set aside, however, the order taking cognizance by the trial court for the offences under Sections 498-A and 406 IPC against the present

petitioners was maintained.

I have heard learned counsel for the parties. Carefully gone through the order passed by the trial court as also the order passed by the revisional court.

It is contended by learned counsel for the petitioners that the petitioners are parents-in-law of the complainant non-petitioner No.2 and no specific act has been assigned as to when the demand of dowry was made and as to when the complainant non-petitioner No.2 was harassed and subjected to cruelty by the present petitioners. It is further contended that the courts below erred in taking cognizance of the offences on the statements of complainant non-petitioner No.2 and some other witnesses. There being no evidence of independent witnesses implicating the present petitioners and therefore, learned counsel submits that both the courts below fell in error in not considering the material properly.

Learned counsel appearing for the non-petitioner No.2 and public prosecutor submit that there is ample evidence and the material on record, showing the involvement of the present petitioners in commission of the crime and both the courts below concurrently found that there is ground to proceed

against the present petitioners and therefore, the concurrent finding arrived at by the courts below calls for no interference in the inherent jurisdiction of this Court.

I have given my thoughtful consideration to the rival submissions made by the counsel for the parties.

On a first information report lodged by non-petitioner No.2 complainant, the police investigated the matter and filed challan against Sumnesh husband of the complainant for the offences under Sections 498-A and 406 IPC. During trial of the case, the complainant non-petitioner No.2 herself was examined as PW-1 and statement of one Kumari Anjana PW-2 was recorded by the trial court. At this stage, an application under Section 319 of the Code was filed by the complainant non-petitioner No.2 on 30.10.2001 requesting therein that the petitioners and others were specifically named in the FIR filed by her. In the FIR, she alleged that her husband Sumnesh, father-in-law Vidhyaram, mother-in-law Smt. Madhukanta and other relatives namely Tarupesh and Smt. Shakti, harassed her and subjected her to cruelty in connection with demand of dowry and therefore, they being not accused in the case have committed the offence and could be tried together with accused Sumnesh. The application filed by the non-petitioner No.2 was allowed by

the trial court vide order dated 13.11.2001. The order of the trial court was challenged by the present petitioners and three others before the revisional court and by an elaborate and well reasoned order, the revisional court also came to the conclusion that there is specific evidence against the present two petitioners that they harassed the non-petitioner No.2 complainant and subjected her to cruelty in connection with demand of dowry and therefore, the trial court was justified in arraigning them as accused and proceeding against them as also to try them with the accused facing trial. However, the revisional court finding no sufficient material against Tarupesh, Kamlesh and Smt. Shakti, quashed the order taking cognizance qua them.

It is contended by learned counsel for the petitioners that the trial court fell in error in arraigning the petitioners as accused on the statements of PW-1 and PW-2, who were not subjected to cross-examination and therefore, their evidence cannot be taken to be an evidence as contemplated under Section 319 of the Code.

A similar controversy came to be considered by Hon'ble Supreme Court in Rakesh Vs. State of Haryana (2001) 6 SCC 248 wherein Hon'ble Supreme Court held as under :-

> "The term "evidence" as used in S. 319 CrPC would mean evidence which is tested by cross-examination cannot be accepted. The question of testing the evidence by cross-examination would arise only after addition of the accused. There is no question of cross-examining the witness prior to adding such person as accused. The section does not contemplate an additional stage of first summoning the person and giving him an opportunity of cross-examining the witness who has deposed against him and thereafter deciding whether such person is to be added as accused or not. Once the Sessions Court records a statement of the witness it would be part of the evidence. There being no cross-examination, it would be a prima facie material which would enable the Sessions Court to decide whether powers under S. 319 should be exercised or not. The word "evidence" occurring in sub-section (1) is used in a comprehensive and broad sense which would also include the material collected by the investigating officer and the material or evidence which comes before the court and from which the court can prima facie conclude that the person not arraigned before it is involved in the commission of the crime."

Learned counsel for the petitioners has relied on a decision of Hon'ble Supreme Court in Michael Machado & Anr. Vs. Central Bureau of Investigation & Anr., AIR 2000 SC 1127, wherein the Hon'ble Apex Court held that the power under Section 319 Cr.P.C. is discretionary and should be exercised only to achieve criminal justice. It is not that the court should turn against another person whenever it comes across evidence connecting that another person also with the offence. It was further held that judicial exercise is called for keeping a

conspectus of the case, including the stage at which the trial has proceeded already and the quantum of evidence collected till then, and also the amount of time which the Court had spent for collecting such evidence. The Apex Court further held that the Court, while examining an application under Section 319 Cr.P.C. has also to bear in mind that there is no compelling duty of the court to proceed against other persons. In a nut shell, it means that for exercise of discretion under Section 319 Cr.P.C., all relevant factors, including the one noticed above, have to be kept in view and an order is not required to be made mechanically merely on the ground that some evidence had come on record implicating the person sought to be added as an accused.

In Lok Ram Vs. Nihal Singh and Anr. AIR 2006 SC 1892, Hon'ble Supreme Court held that the trial court under S. 319 has undoubted jurisdiction to add any person not being accused before it to face the trial along with other accused persons, if the Court is satisfied at any stage of the proceeding on the evidence adduced that the persons who have not been arrayed as accused should face the trial. It is further evident that such person even though had initially been named in the F.I.R. as an accused, but not charge-sheeted, can also be added to face the trial. The trial Court can take such a step to add such

persons as accused only on the basis of evidence adduced before it and not on the basis of materials available in the charge-sheet or the case diary, because such materials contained in the charge-sheet or the case diary do not constitute evidence.

Keeping in view, the evidence on record and the fact that both the petitioners were named in the FIR lodged by non-petitioner No.2 complainant with specific allegation of harassing and subjecting the non-petitioner No.2 complainant to cruelty in connection with demand of dowry as also there is evidence that the dowry articles, which are the "Stridhan" of non-petitioner No.2 complainant, were entrusted to the present petitioners and Sumnesh the husband, and on demand, failed to return the same and as such there is evidence of criminal breach of trust and therefore, in my view the trial court as well as the revisional court were justified in arraigning the petitioners as accused to be tried together with the accused facing trial.

It is settled law that power under Section 482 of the Code should be sparingly and judiciously exercised when it appears that non exercise of power would result in serious miscarriage of justice or abuse of power of the Court. In the instant case, it cannot be said that the orders impugned would result in serious miscarriage of justice or abuse of power of the

Court. In this view of the matter, I do not find any merit in the petition.

The criminal misc. petition is accordingly dismissed. Ad-interim stay order dated 9.2.2005 is vacated. The stay petition also stands dismissed.

(H.R.PANWAR),J.

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